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No. 97-1888

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DIKAR, S. COOP. LTDA,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF KENTUCKY
(MATTHEW HAYMAKER, REAL PARTY IN INTEREST),

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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REPLY BRIEF

Defendant Dikar, S. Coop. LTDA ("Dikar") respectfully submits this reply brief in support of its petition for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Sixth Circuit.

Argument

1. Plaintiff, Matthew Haymaker ("Haymaker"), opposes certiorari primarily on the ground that the question presented -- whether non-jurisdictional discovery may proceed before the district court has made a finding of personal jurisdiction over Dikar -- is moot because, according to Haymaker, the district court found that it had such jurisdiction by virtue of its orders issued on August 19, 1997, and October 8, 1997. *See* Opp. at 4-5. The record below, however, flatly belies Haymaker's contention.

In response to a similar argument advanced by Haymaker below, the Sixth Circuit did not interpret the district court's orders as constituting a finding of personal jurisdiction over Dikar. Indeed, the Sixth Circuit framed the issue presented as whether to grant a "writ of mandamus directing that discovery in this action be limited to personal jurisdiction issues until *after* the district court determines whether it can exercise personal jurisdiction over the petitioner." Pet. App. 1a (emphasis added). The court below did not question at any point the factual premise for this issue, which is that the district court has not yet made any finding of personal jurisdiction over Dikar.

Furthermore, the district court's orders themselves do not contain any statement that the exercise of personal jurisdiction over Dikar is appropriate. Instead, the district court deferred ruling on the jurisdictional issue until after discovery is completed. The August 19, 1997, order states that, although the motion to dismiss was denied, Dikar would be allowed to "renew *any* dispositive motion concerning jurisdictional issues" at the conclusion of "all discovery", Pet. App. 6a (emphasis added), thus making clear that the court would not address the jurisdictional issue until the conclusion of discovery. The district court's deferral of its decision was consistent with Haymaker's earlier request for discovery before the district court ruled on the jurisdictional issue. *See* Pet. at 5.[1]

Moreover, a recent decision by the same district judge who presides over the present case, Judge Karl S. Forester, confirms that the district court did not find that it had personal jurisdiction over Dikar. In *Howard v. Connecticut Valley Arms, Inc.*, No. 97-414 (E.D. Ky. June 22, 1998) (reprinted as Appendix A hereto), Dikar moved to dismiss on the same jurisdictional grounds raised in the present case. Judge Forester then ordered:

> For the reasons cited in *Haymaker v. Connecticut Valley Arms, et al.*, Civil Case No. 97-28 (E.D. Ky.),

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[1]Moreover, as Dikar has explained, the district court could not have intended to issue a substantive ruling on personal jurisdiction because briefing of that issue was not completed when the district court issued its August 19, 1997, order. *See* Pet. at 7 n.1. Also, as a matter of logic, the district court's order could not have been a ruling that it has personal jurisdiction over Dikar. It would have made no sense for the district court to grant Haymaker leave to conduct discovery of jurisdictional facts if the court had already determined the jurisdictional issue in Haymaker's favor.

> the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS THAT:
>
> (1) defendant's motion to dismiss for lack of jurisdiction [docket entry 8] IS PASSED PENDING THE CONCLUSION OF DISCOVERY;
>
> . . . .

Reply App. 1a-2a.

Thus, Judge Forester himself rejects Haymaker's claim that the district court ruled on the substantive merits of Dikar's jurisdictional defense. Instead, Judge Forester views his orders in the present case as only establishing that his ruling on personal jurisdiction is deferred, or "passed", until all discovery is completed. The question presented regarding the proper scope of discovery prior to the district court's ruling on personal jurisdiction, therefore, is properly before this Court.

2. Although Haymaker asserts that "the plaintiff need only make a *prima facie* showing of personal jurisdiction," Opp. at 5, there is no finding in the district court's orders that a *prima facie* showing has been made here. By contrast, in an opinion recently issued by Judge Joseph M. Hood of the United States District Court for the Eastern District of Kentucky (the same district in which the present case is pending before Judge Forester), the court ***did*** explicitly address whether a *prima facie* showing of personal jurisdiction over Dikar had been made. Based upon a jurisdictional record identical in all material respects to the present case, Judge Hood held that the *Bowman* plaintiffs had ***failed*** to make a *prima facie* showing of jurisdiction over Dikar. *See Bowman v. Cumberland Valley Arms*, Civ. No.

97-296 (E.D. Ky. June 10, 1998) (reprinted as Appendix B, hereto), *motion for reconsideration pending*.[2]

The *Bowman* plaintiffs, like Haymaker, brought a products liability action against Dikar, claiming injuries from an accident involving use of a rifle allegedly manufactured by Dikar. As in the present case, Dikar moved to dismiss the complaint in *Bowman* on the basis of lack of personal jurisdiction.

The *Bowman* court held, *inter alia*, that the plaintiffs had "failed to set forth a prima facie case on personal jurisdiction over Dikar. . ." Reply App. 4a. Citing *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), Judge Hood noted that "[t]he Supreme Court . . . effectively established that a defendant's act of placing a product into the stream of commerce was no longer sufficient" to establish personal jurisdiction. Reply App. 6a. The court thus squarely rejected the stream-of-commerce theory advanced by Haymaker in the present case. Relying on an affidavit of Jon Muniategui, Dikar's General Director, the *Bowman* court concluded: "[T]he Court cannot say that Dikar has had sufficient contact with Kentucky to satisfy the due process clause of the U.S. Constitution." Reply App. 7a.

Although the *Bowman* court allowed limited discovery to proceed notwithstanding the plaintiffs' failure to make a *prima facie* showing, the order nevertheless makes clear that such discovery would be limited to *jurisdictional* facts only. Thus, the conflict in the lower courts regarding the scope of

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[2]The lead defendant in *Bowman*, Connecticut Valley Arms, Inc., is erroneously listed in the case caption of the order as "Cumberland Valley Arms."

discovery when jurisdiction is in dispute (*see* Pet. at 15-19) now exists between federal judges in the very district where the present case arises.

3. Haymaker also argues that certiorari should be denied because, according to Haymaker, the district court's decision is a purely discretionary, essentially non-reviewable ruling. As this Court has recently reiterated, however, discretionary decision making of a district court is not immune from appellate review when the district court's ruling is based on an error of law. *See, e.g., Koon v. United States*, 116 S. Ct. 2035, 2047 (1996) (noting that a district court lacks "discretion" to disregard the law).

Simply put, a district court does not have discretion to issue orders that violate the Due Process Clause by subjecting a party to non-jurisdictional discovery prior to a finding of personal jurisdiction over that party. Where a constitutional violation would result if a order is allowed to stand, this Court has granted certiorari after an appellate court refused to grant a writ of mandamus or prohibition. *See, e.g., Asahi*, 480 U.S. 102; *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286 (1980).

4. Finally, Haymaker's claim of undue burden and wasted judicial resources arising from limiting discovery to jurisdictional issues rings hollow for at least two reasons. First, as the *Bowman* decision suggests, the jurisdictional facts will likely be insufficient to establish that Kentucky has personal jurisdiction over Dikar -- in which case, the resources of the parties and the judiciary would be best preserved if discovery of non-jurisdictional facts, irrelevant to disposition of the case, does not take place.

Second, to the extent that the burdens on the parties influence due process analysis in personal jurisdiction cases, the focus is not on the in-state plaintiff's interests, but rather on the out-of-state defendant's burden of litigating in the forum state, particularly where, as here, the defendant is an entity of a foreign country. *See, e.g., Asahi*, 480 U.S. at 114 ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."); *American Dredging Co. v. Miller*, 510 U.S. 443, 460 (1994) ("[T]he Due Process Clause provides an important measure of protection for out-of-state defendants, especially foreigners.") (Stevens, J., concurring in part and concurring in the judgment) (citing *Asahi* and *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984)). Thus, rather than weigh against certioriari, the burdens on the parties relevant here as well as conservation of judicial resources militate in favor of this Court's review.

Conclusion

There is no basis in the record for Haymaker's assertion that the district court in the present case made a finding of jurisdiction over Dikar. In fact, the record reveals that Judge Forester has not made any jurisdictional ruling, but instead has delayed ruling on the issue until all discovery is completed in this case. Indeed, in *Howard*, Judge Forester confirmed that he has not made any finding of personal jurisdiction over Dikar in the present case. By allowing discovery of non-jurisdictional facts to proceed in this case prior to any finding of personal jurisdiction, the district court has violated Dikar's due process rights and therefore is not entitled to any deference by this Court.

Judge Forester's decision now is in conflict not only with the opinions of several appellate courts noted in the petition for certiorari, but also with a decision squarely on point recently issued by Judge Hood, who is Judge Forester's colleague on the same district court. Accordingly, for the foregoing reasons and those set forth in the petition for certiorari, the Court should grant certiorari and set the case for plenary review to resolve this conflict.

Respectfully submitted,

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APPENDIX

Howard v. Connecticut Valley Arms, Civ. No. 97-414 (E.D. Ky. June 22, 1998) . . . . . Appendix A

Bowman v. Connecticut Valley Arms, Civ. No. 97-296 (E.D. Ky. June 10, 1998). . . . . Appendix B

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 97-414

SHERMAN HOWARD, PLAINTIFF,

V.

CONNECTICUT VALLEY ARMS,
WAL-MART STORES, INC., and
DIKAR, S. COOP. LTDA. DEFENDANTS.

ORDER

[Filed June 22, 1998]

This matter is before the Court on two motions, to wit, (1) the motion of Dikar, S. Coop. Ltda. ("Dikar") to dismiss plaintiff's complaint as against Dikar pursuant to Fed.R.Civ.P. 12(b)(2), (5), on the grounds that the Court lacks personal jurisdiction over Dikar and that service of process was insufficient, and (2) the motion of the plaintiff, Sherman Howard ("Howard"), for leave to re-serve Dikar in accordance with the Hague Service Convention.

For the reasons cited in *Haymaker v. Connecticut Valley Arms, et al.*, Civil Case No. 97-28 (E.D.Ky.), the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS THAT:

(1) defendant's motion to dismiss for lack of jurisdiction [docket entry 8] IS PASSED PENDING THE CONCLUSION OF DISCOVERY;

(2) defendant's motion to dismiss for improper service [docket entry 8] IS DENIED; and

(3) plaintiff's motion to re-serve Dikar [docket entry 10] IS GRANTED.

This 22nd day of June, 1998.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 97-296

FYRELON BOWMAN, ET AL., PLAINTIFFS,

v.

CUMBERLAND VALLEY ARMS, ET AL.,
DEFENDANTS.

MEMORANDUM OPINION & ORDER

[Entered June 10, 1998]

This matter is before the Court in the motion of the defendant, Dikar, S. Coop. LTDA. ("Dikar"), to dismiss for lack of personal jurisdiction over it. In support, Dikar submits that it does not have sufficient minimum contacts with the State of Kentucky for this Court to exercise personal jurisdiction over it. Also, the plaintiffs have failed to properly serve it under Fed. R. Civ. P. 4(f)(2).

The plaintiffs have responded, arguing that they have made out a prima facie case for personal jurisdiction and that further discovery is needed. The plaintiffs, however, have failed to respond to Dikar's contention that it was not properly served.

Being fully briefed, this matter is now ripe for decision. Having reviewed the record and the memoranda submitted by

the parties, the Court finds that the plaintiffs have failed to set forth a prima facie case on personal jurisdiction over Dikar and have failed to properly serve Dikar. However, because the Court is compelled to grant the plaintiffs additional time to properly serve Dikar and to conduct discovery on the issue of personal jurisdiction, the Court declines to grant Dikar's motion to dismiss at this time. Consistent with that determination, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The plaintiff, Fyrelon Bowman, purchased a Connecticut Valley Arms ("CVA") .50-caliber inline muzzle-loading rifle from the Wal-Mart Store in Whitesburg, Kentucky. While shooting the rifle, the rifle exploded, causing him severe injuries to his face and right eye. He has brought this suit, seeking damages for the injuries he sustained as a result of the explosion. His wife has joined in the suit, seeking damages for loss of consortium as a result of the incident.

The defendant, Dikar, has now moved the Court to dismiss the action against it on the basis that the Court lacks personal jurisdiction over it and that it has not been properly served. First, Dikar submits that it has "insufficient contact with Kentucky to support the exercise of jurisdiction consistent with the Kentucky long-arm statute and the Due Process Clause." Second, Dikar relays that the plaintiffs did not serve process on it "in accordance with the Hague Service Convention, as required by Fed. R. Civ. P. 4(f)(2)."

The plaintiffs respond that Dikar's motion should be denied because they have shown sufficient contacts by Dikar with Kentucky for Kentucky to assert personal jurisdiction over Dikar. Moreover, they assert that the motion is

premature because they have not had an opportunity to conduct discovery on this matter.

The defendants reply that the plaintiffs' arguments fail. First, they highlight the fact that the plaintiffs failed to even address the issue of ineffective service of process on it. Second, Dikar submits that discovery is not necessary where the plaintiff has failed to even put forth a prima facie showing of minimum contact sufficient to support personal jurisdiction. Last, Dikar maintains that it does not have sufficient contacts with Kentucky to support this Court exercising personal jurisdiction over it.

CONCLUSIONS OF LAW

I. The Plaintiffs have Failed to Make a Prima Facie Showing of Minimum Contacts Sufficient to Support the Court Exercising Personal Jurisdiction Over Dikar

In order for a State to exercise personal jurisdiction over a defendant, the defendant must have some minimum contact with that State for due process to be satisfied. The Supreme Court has clearly stated,

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

In deciding whether a defendant has sufficient contact with the forum state to past constitutional muster, the Court must determine whether the defendant has purposefully availed itself of the benefits and privileges of conducting business within the forum state. *Asahi Metal Indus. Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 108-09 (1987).

> The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant. "[T]he constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposefully established 'minimum contacts' in the forum State.'" Most recently we have reaffirmed the oft-quoted reasoning of *Hanson v. Denkla*, that minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." "Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State."

Id. (internal citations omitted). The Supreme Court, thus, effectively established that a defendant's act of placing a product into the stream of commerce was no longer sufficient; instead, "minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." *Id.* at 112; *see also Halderman v. Sanderson Forklifts Co., Ltd.*, 818 S.W.2d 270, 274 (Ky. Ct. App.

1991) (noting that a plurality of the Supreme Court had rejected the "stream of commerce" doctrine in *Asahi*).

Based on the defendant's affidavit, which has not been countered by the plaintiff, Dikar is a small business owned and operated in Spain, which has never sold, promoted or marketed any product or service in the United States. Although it does manufacture the rifle involved in this case, the rifle was made solely at the request of CVA, and CVA had the sole discretion to distribute the rifle. Dikar had no involvement in any subsequent sale of the rifle and did not discuss, correspond or communicate with CVA what region of the United States the rifle would be sold. Particularly, Dikar had no idea that the rifle would be or was sold in Kentucky. Based on the above facts, then, the Court cannot say that Dikar has had sufficient contact with Kentucky to satisfy the due process clause of the U.S. Constitution. *Asahi*, 480 U.S. at 112-13.

II. Because No Discovery Has Been Taken, The Court Will Not Dismiss This Matter for Lack of Jurisdiction At This Time

Because, however, no discovery has been taken in this matter, and because the plaintiffs specifically request that discovery on Dikar's contacts with Kentucky be allowed, the Court will not grant Dikar's motion at this time. Although Dikar argues that discovery need not be taken when a plaintiff has failed to set forth a prima facie showing of personal jurisdiction, *see Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 154 (6th Cir. 1997); *Market/Media Research, Inc. v. Union-Tribune Publ'g Co.*, 951 F.2d 102, 106 (6th Cir. 1991), cer. denied, 506 U.S. 824 (1992), the Sixth Circuit gives the district court discretion to allow limited discovery when personal

jurisdiction is in question. *Theunissen v. Matthews*, 935 F.2d 1454, 1465 (6th Cir. 1991). In fact, the First Circuit has even implied that it would be an abuse of discretion not to allow limited discovery where the plaintiff has asked for such discovery. *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 681 (1st Cir. 1992).[1]

III. Discovery Cannot Be Taken As Dikar Has Not Been Properly Served

Whether discovery should be allowed, however, is a moot point at this time since the plaintiffs have not sufficiently served Dikar. Under Fed. R. Civ. P. 4(f)(2), Dikar was to be served pursuant to the Hague Convention treaty. The Hague Convention treaty does not allow for service of process by certified mail. *See Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989). Instead, process is to be served through the appropriate Central Authority, the Secretaria General Tecnica for Spain. *See* Fed. R. Civ. P. 4, Convention On The Service Abroad of Judicial And Extrajudicial Documents In Civil Or Commercial Matters, Chapt. I, Article 2; *see also Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1389 (8th Cir. 1995).

Since the plaintiffs have failed to properly serve Dikar, the Court must either dismiss this matter without prejudice or give the plaintiffs additional time to properly serve Dikar.

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[1]It should be noted that the cases Dikar relies on, *Kerry Steel, Inc.* and *Market/Media Research, Inc.*, mainly dealt with whether the district court should grant an evidentiary hearing. Moreover, the *Kerry Steel, Inc.* court highlighted the fact that the plaintiff had "neither moved for an evidentiary hearing nor requested that the court delay its ruling to allow additional discovery." 106 F.3d at 154.

Although the Court finds the plaintiffs' lack of a response on this matter to not warrant extending the time for service, the courts which have addressed this very situation have merely quashed service and allowed the plaintiff an extension of time to effect service. *See Bankston*, 889 F.2d at 174; *Vorhees v. Fischer & Krecke*, 697 F.2d 574, 576 (4th Cir. 1983); *Wilson v. Honda Motor Co., Ltd.*, 776 F. Supp. 339, 342 (E.D. Tenn. 1991); *Lyman Steel Corp. v. Ferrostaal Metals Corp.*, 747 F. Supp. 389, 401 (N.D. Ohio 1990). Thus, the Court feels compelled to provide an additional amount of time for service.

If, however, Dikar is not properly served within that time, Dikar need only make a renewed motion to dismiss and such motion will be granted. If Dikar is properly served within that time frame, the Court will allow the plaintiffs to take limited discovery on the issue of personal jurisdiction. After such discovery is taken, the Court will entertain whether the plaintiffs have proved sufficient minimum contacts. Accordingly,

IT IS ORDERED that the motion to dismiss by the defendant, Dikar, [Record No. 8] be, and the same hereby is, **DENIED WITHOUT PREJUDICE**; Dikar may renew its motion, if necessary, after the additional time for service of process or for limited discovery has elapsed. **IT IS FURTHER ORDERED** that service of process upon the defendant, Dikar, [Record No. 7] be, and the same hereby is, **QUASHED**; the plaintiffs **SHALL** have until July 10, 1998, to effect service on Dikar. If, within the time-frame, proper service is effected, the plaintiffs **SHALL** have until August 10, 1998, to conduct discovery on whether Dikar has sufficient contact with Kentucky for the Court to entertain personal jurisdiction.

This the 9th day of June, 1998

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service: June 10, 1998